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7 **IN THE SUPREME COURT**

8 **STATE OF ARIZONA**

9 **In the Matter of:**

Supreme Court No.: R-09-0040

10 **PETITION TO AMEND**
11 **RULE 35, ARIZONA RULES OF CIVIL**
12 **PROCEDURE**

Comment of the Pima County Bar
Association on Petition to Amend
Rule 35 Arizona Rules of Civil
Procedure

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14 The Pima County Bar Association (PCBA) respectfully submits this Comment
15 regarding the petition to amend Rule 35, Arizona Rules of Civil Procedure.

16 The PCBA does not believe it appropriate to represent to this Court that its
17 membership either supports or opposes the Petition. The PCBA's Rule Committee
18 is divided on the proposed amendments relating to the elimination of the current
19 Rule 35(a)'s court order requirement and the alternative procedure of the current
20 Rule 35(c), the allowance of video-recording as a matter of right, and the expansion
21 of those allowed to perform a Rule 35 examination. As a result, the PCBA believes
22 its greater membership is also divided on the Petition.

23 Nonetheless, if this Court adopts the Petition, the PCBA recommends the
24 Court adopt and/or endorse a comment similar to the Advisory Committee Note
25 accompanying the 1991 Amendment to the federal Rule 35, Fed. R. Civ. P., so as to
26 clarify the scope of the intended modification to the qualifications of a Rule 35
examiner. The text of the federal note follows:

1 **1991 Amendment**

2 The revision authorizes the court to require physical or mental
3 examinations conducted by any person who is suitably licensed or
certified.

4 The rule was revised in 1988 by Congressional enactment to authorize
5 mental examinations by licensed clinical psychologists. This revision
6 extends that amendment to include other certified or licensed
7 professionals, such as dentists or occupational therapists, who are not
physicians or clinical psychologists, but who may be well-qualified to give
valuable testimony about the physical or mental condition that is the
subject of dispute.

8 The requirement that the examiner be *suitably* licensed or certified is a
9 new requirement. The court is thus expressly authorized to assess the
10 credentials of the examiner to assure that no person is subjected to a
11 court-ordered examination by an examiner whose testimony would be of
such limited value that it would be unjust to require the person to undergo
the invasion of privacy associated with the examination. This authority is
not wholly new, for under the former rule, the court retained discretion to
12 refuse to order an examination, or to restrict an examination. 8 WRIGHT &
13 MILLER, FEDERAL PRACTICE & PROCEDURE § 2234 (1986 Supp.).
The revision is intended to encourage the exercise of this discretion,
14 especially with respect to examinations by persons having narrow
qualifications.

15 The court's responsibility to determine the suitability of the examiner's
16 qualifications applies even to a proposed examination by a physician. If
17 the proposed examination and testimony calls for an expertise that the
proposed examiner does not have, it should not be ordered, even if the
proposed examiner is a physician. The rule does not, however, require
18 that the license or certificate be conferred by the jurisdiction in which the
examination is conducted.

19
20 RESPECTFULLY SUBMITTED this 19th day of May, 2010.

21
22 By Joey A. Flynn
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Electronic copy filed
with the Clerk of the Supreme
Court of Arizona this 20th day
of May, 2010.

By: JAP